

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JULIA JOHNSON and DJM,

Plaintiffs,

ORDER

10-CV-1964 (JS)(WDW)

- against -

EDDIE JAMES MYERS, et al.,

Defendants.

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APPEARANCES:

For Plaintiffs:

Julia Johnson	Julia Johnson, <u>pro se</u> 943 Wallace Avenue Baldwin, NY 11510
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DJM	Julia Johnson, <u>pro se</u> 943 Wallace Avenue Baldwin, NY 11510
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For Defendants:

Eddie James Myers, Jr.	Danielle J. Seid, Esq. Lance D. Simon, Esq. Law Offices of Anthony A. Capetola Two Hillside Avenue Williston Park, NY 11596
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Donna Guarton Nassau County Baldwin	Lewis R. Silverman, Esq. Christopher James Soverow, Esq. Rutherford & Christie, LLP 369 Lexington Avenue, 8th Floor New York, NY 10017-5947
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Benjamin Malewicz Jody Weitzman-Fisher P.O. Patterson John Ciapoli	Pablo A. Fernandez, Esq. Donna A. Napolitano, Esq. Liora M. Ben-Sorek, Esq. Nassau County Attorney's Office One West Street Mineola, NY 11501
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Justice Karen Murphy	No appearances.
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Dr. Robert Barris
Dr. G. St. Victor
Arthur A. Gianella

Roger B. Lawrence, Esq.
Lawrence, Worden & Rainis, P.C.
225 Broad Hollow Road, Suite 105E
Melville, NY 11747

Cyrus R. Vance, Jr.

Rebecca Rachel Hirschklau, Esq.
New York City Law Department
100 Church Street, Room 2-183
New York, NY 10003

SEYBERT, District Judge:

On February 10, Defendants Robert Barris, M.D., Dr. G. St. Victor and Arthur A. Gianella ("Nassau University Defendants") moved to dismiss under FED. R. CIV. P. 12(b)(6). See Docket No. 68. This motion is, sua sponte, DENIED.

The Nassau University Defendants' motion displays a lack of knowledge of basic federal practice. To begin with, the Nassau University Defendants purport to move under Rule 12(b)(6), despite having answered the Complaint more than seven months ago, back on June 29, 2010. See Docket Nos. 18-20. But a Rule 12(b)(6) motion "must be made before pleading if a responsive pleading is allowed." See FED. R. CIV. P. 12(b); Diez v. Wash. Mut. Bank, 09-CV-2390, 2010 U.S. Dist. LEXIS 135457, at *1 (E.D.N.Y. Dec. 21, 2010) (denying a post-answer Rule 12(b)(6) motion as "improper"); Federal Ins. Co. v. M/V Ville D'Aquarius, 08-CV-8997, 2009 WL 3398266, at *3 (S.D.N.Y. 2009) (Rule 12(b)(6) motion cannot be made after an answer); Leonard v. Enterprise Rent a Car, 279 F.3d 967, 971 n.6 (11th Cir. 2002). And, although the Court could, in some instances, construe this

motion as a Rule 12(c) motion for judgment on the pleadings, it cannot do so here, because the pleadings remain open and--indeed--valid motions to dismiss remain pending. See Vieira v. Honeoye Cent. Sch. Dist., 09-CV-6163, 2010 U.S. Dist. LEXIS 121762, at *12 (W.D.N.Y. Nov. 16, 2010) (a court can construe a post-answer 12(b)(6) motion as a 12(c) motion for judgment on the pleadings); Little v. F.B.I., 793 F. Supp. 652, 652 (D. Md. 1992) ("a motion for judgment on the pleadings is plainly inappropriate here, because the pleadings have not been closed by answers from all defendants").

Second, to the extent the Nassau University Defendants intended to move under Rule 12(b)(6) while referring to matters outside the pleadings, they failed to comply with Local Rule 12.1. For, although they purported to send the pro se Plaintiffs a Local Rule 12.1 Notice, this Notice mysteriously did not contain the language that Local Rule 12.1 requires. Instead, they provided their own language, which misleadingly misstates the law. Compare Docket No. 71 (stating that the Complaint may be dismissed "if you do not respond to this motion by filing sworn affidavits or other papers as required by Rule 12(b)(6)") with Local Rule 12.1 (warning the pro se that the Court may treat the defendant's 12(b)(6) motion "as a motion for summary judgment" and noting that the complaint may be dismissed "if you do not respond to this motion by filing sworn affidavits and other papers as required by Rule 56(e)").

Third, the Nassau University Defendants oddly accompanied their purported Rule 12(b)(6) motion with a Local Rule 56.1 Statement and numerous exhibits. And their brief relies on this evidentiary material. But, to the extent that the Nassau University Defendants actually intended to move for summary judgment, they failed to comply with this Court's Individual Practices.

Especially given Plaintiffs' pro se status, the Court cannot excuse these procedural defects. Thus, the Nassau University Defendants' motion is DENIED. To the extent that this motion is brought under Rule 12(b)(6), this denial is WITH PREJUDICE, because, by answering, the Nassau University Defendants forfeited their right to move to dismiss under Rule 12(b)(6). To the extent that the Court construes the Nassau University Defendants' motion as one for summary judgment under Rule 56, this denial is WITHOUT PREJUDICE. The Nassau University Defendants may file a procedurally-compliant summary judgment motion at the appropriate time.

The Clerk of the Court is directed to send a copy of this Order to the pro se Plaintiffs.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
February 18, 2011